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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 785

SAN DIEGO ELECTRIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Respondent.

Appeal from the District Court of Appeal of the State of California in and for the Third Appellate District

Appellant's Brief Opposing Motion by Appellee to Dismiss or Affirm

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Appeal from the District Court of Appeal of the State of California in and for the Third Appellate District

Appellant's Brief Opposing Motion by Appellee to Dismiss or Affirm

I. OUR JURISDICTIONAL STATEMENT IS NOT CHALLENGED BY APPELLEE EXCEPT ONLY AS TO THE MERITS OF THE FEDERAL QUESTIONS.

Appellee does not question anything in our Jurisdictional Statement except only our position that the Federal

questions are substantial and were decided erroneously by the state court.

We assume that our Jurisdictional Statement will be considered along with this brief in connection with appellee's motion to dismiss or affirm, and we will therefore not repeat here any of the contents thereof.

II. THE INTIMATION IN APPELLEE'S ARGUMENT THAT THE FEDERAL QUESTIONS WERE NOT STRONGLY RELIED ON BY APPELLANT IN THE LOWER COURT IS CONTRARY TO FACT.

Appellee states in its argument that appellant's "primary contention" in the lower courts was that the statute should be so interpreted as to permit an apportionment of the fare, and that "the main burden of appellant's position here, however, is that the statute is discriminatory and unconstitutional." There is an intimation here that we did not strongly rely on the Federal questions in the state courts and are now seriously pressing them for the first time.

There is no foundation for the statement that our "primary contention" in the lower courts was the interpretation of the statute. Appellant's Opening Brief[1] in the District Court of Appeal devotes only five pages at the *end* to argument of the interpretation of the statute, and all the rest of the argument in that forty-two page brief is devoted to the constitutional questions and the subject of discrimination. Moreover, an examination of appellant's argument on the interpretation of the statute will

[1]Appellant's Opening Brief in the District Court of Appeal is included in the record on appeal in this court.

make clear that the argument was subsidiary to the constitutional argument and was made mainly for the purpose of pointing out to the court a possible way to avoid declaring the statute unconstitutional.

We would not wish this court to derive the erroneous impression that the constitutional questions in this case have ever at any time been subordinated by appellant to any other point.

III. IT IS NO ANSWER TO A CHARGE THAT A TAX STATUTE DISCRIMINATES AGAINST A CLASS TO REPLY THAT THE TAX ADMINISTRATOR IN ADMINISTERING THE STATUTE DISCRIMINATES IMPARTIALLY AGAINST ALL MEMBERS OF THAT CLASS.

In defense of the statute appellee argues that the Tax Administrator has applied the tax in the same way to all bus operators in California, including operators in urban areas similar to San Diego.

It may be conceded that the Tax Administrator always did what the statute (as interpreted by the state court) prescribes.

But we are not here complaining of anything that the Tax Administrator did or did not do. We are complaining of the *statute itself*. The fact that the Tax Administrator collected the tax in the same way from appellant and all similar operators shows only that he carried out the discrimination which the statute creates.

The statute itself discriminates between two classes of taxpayers, and appellant is a member of the class discriminated against. It is immaterial that there may not be discrimination within either class.

IV. INCIDENTAL RECEIPTS AND COMPARATIVE RATE SCHEDULES ARE IMMATERIAL IN THIS CASE AND APPELLANT'S PROOF OF DISCRIMINATION WAS FULL AND COMPLETE.

A. Appellee Argues That Appellant Should Have Proved All Incidental Receipts and All Fares Paid.

In our Jurisdictional Statement we set forth our contention that the statute provides for a highway user tax, upon the principle of tax according to the extent of use of highways outside cities. We also set forth our contention that, if the tax is of that nature, all passenger bus operators who use highways outside cities must be taxed at the same *rate* without discrimination.

Appellee says there are "several fallacies" in our argument. In the first place, appellee says, the tax is not a tax according to use because, as appellee points out, certain *statewide truck operators,* who carry *freight only,* derive some incidental taxable receipts from accessorial services which receipts may not be in direct proportion to highway use. In the second place, appellee says, we failed to present "comparative rate schedules or other evidence" demonstrating that in fact appellant bore a greater burden of tax than did other operators.

Let us consider these claimed fallacies in the order stated.

B. Passenger Bus Operators Have No Incidental Receipts and Such Receipts Would Be Immaterial in Any Event.

On its face, the statute provides for a tax according to extent of use of highways outside cities. The fact that the tax is levied on "gross receipts" plainly establishes the principle of tax according to extent of use. The fact of exemption of operations *inside* cities plainly establishes

that it is the use of highways *outside* cities which is to measure the amount of the tax.

Appellee nevertheless says it is fallacious to say that this is a tax according to use because of incidental taxable receipts from accessorial services.

The answer to appellee's argument, however, is that *passenger bus* operators perform no such accessorial services and have no such incidental taxable receipts, and the California decisions cited by appellee[2] have no application to *passenger bus* operations. Under the statute receipts to be taxable must be derived "from the operation of motor vehicles," and it is difficult to conceive of any incidental receipts of a passenger bus operator which would be taxable within the words of the statute or the principle of the decisions cited by appellee.

Appellee's argument that the tax is not one according to use lacks force *even as to statewide freight carriers*, because the statute taxes them all alike and thus preserves their same relative positions and carries out the principle of tax according to use.

In any event, the entire subject of taxable incidental receipts is trivial in relation to the magnitude of the discrimination of which appellant complains. Appellant complains of discrimination by which it is taxed at a rate many times the rate imposed upon others, as a result of which the incidental receipts would have to exceed very

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[2]*Bekins Van Lines, Inc. v. Johnson* (1942), 21 Cal.2d 135, 130 Pac.2d 421; *Southern California Freight Lines v. State Board of Equalization* (1945), 72 Cal. App.2d 26, 163 P.2d 776. In the operation of passenger buses there is nothing comparable to the loading, unloading, pick-up and delivery services performed by truck operators and consequently there are no comparable incidental revenues from such services.

substantially all the rest of the receipts put together before the effect on the picture of discrimination would be perceptible.[5] It would be idle and unnecessarily burdensome to show such incidental receipts, even if there were any, when the showing could not possibly alter the picture of discrimination.

We think there is no "fallacy" in appellant's argument on account of any incidental receipts.

C. Comparative Rate Schedules Are Immaterial to Appellant's Claim of Discrimination.

It was no necessary part of appellant's case to present comparative rate schedules of itself and other operators as basis for a calculation to show the *precise* degree of discrimination between appellant and each other operator. That is so for two reasons.

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[5]As contrasted with appellant's small proportionate use of highways outside cities (Findings, Paragraph IV, (Cl. Tr. 29) and Plaintiff's Exhibit 1) see the *uncontradicted* testimony of appellant's witness Weeks to the effect that the following passenger bus operators operate the following percentages of their total operations in unincorporated territory (Rep. Tr. 64-66):

Operator	Per Cent
Pacific Greyhound Lines	90
Airline Bus Company	93
Burlington Trailways	94
Citizens Transit Company	66
Feather River Stages	93
Los Angeles-Trona Stages	96
Moyer's Stages	92
Overland Greyhound Lines	94
Santa Fe Trailways	93
Yosemite Park and Curry Company	98

If appellant pays the full amount of the tax on the *total fare collected* for a ride which is only 5 or 10 per cent in unincorporated territory, and Pacific Greyhound Lines pays the *same rate* on the total fare collected for a ride which is *90 per cent* in unincorporated territory, it follows by simple arithmetic that for the use of highways outside cities appellant has been taxed at a rate many times the rate charged Pacific Greyhound Lines.

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In the *first* place, this is a highway user tax and appellant is complaining of discrimination in the *rate* of tax to which it is subjected—not in the total amount. The precise fares paid by passengers, as well as the exact amount of gross receipts of the operator, are alike immaterial to such claim of discrimination. We have proved a discrimination in *rate* as between appellant and other operators, and it is immaterial to what volume of business that rate is applied or what were the individual fares making up the total taxable gross receipts.

In the *second* place, the discrimination here complained of is so great that no difference in fares per passenger mile could alter it.[4] Appellant points to discrimination against it of hundreds of per cent in *rate,* and comparative fares and total gross receipts have no bearing on that kind of discrimination.

We see no fallacy in our argument based on omission to supply data which could in no way alter the picture.

D. Appellant's Proof of Discrimination Was Full and Complete.

Appellant's proof of discrimination was full and complete without any detail as to incidental revenues or particular fares.

Appellant proved that Pacific Greyhound Lines, for example, is taxed no more for the use of twelve miles of highway in unincorporated territory than appellant is taxed for the use of four hundred forty yards in such territory, which establishes that in that instance appellant is taxed at forty-eight times the rate paid by the other operator. In the face of such discrimination the little matters to which appellee directs attention are not worth mentioning.

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[4]See note 3 ante.

V. THE DISCRIMINATION RELIED ON BY APPELLANT IS IN FAVOR OF THE STATEWIDE OPERATORS. APPELLANT IS NOT ATTACKING THE EXEMPTION OF CITY OPERATIONS.

In our Jurisdictional Statement we discussed this court's decision in the *Aero Transit Co.*[5] case which appellee still relies on. That decision is not applicable here because we have here a tax according to use, and not a tax in a fixed amount to be paid by all alike. If we concede that the principle of the *Aero Transit Co.* decision is not limited to a tax in a fixed amount to be paid by all alike, but applies to *any* non-discriminatory tax, that merely brings us back to the question of whether or not this particular tax is discriminatory. If the tax is *discriminatory* it makes no difference whether you call it a highway user tax or something else. We fail to see in what way the *Aero Transit Co.* decision advances the solution of the problem here presented.

The ultimate question is not—Is the tax a highway user tax?—but is—Is the tax discriminatory? Whatever you call the tax it taxes appellant at a higher rate for the use of highways outside cities than it taxes other operators.

It is no answer to say that it taxes appellant at the same rate if you take into account highways inside as well as outside cities. The statute *exempts* operations inside cities, and when it taxes a city operator for the use of *twelve miles* of highway because the operator carries a passenger *four hundred forty yards* over the city boundary line, the truth and fact of the matter is that the city operator has to pay a tax for the use of *twelve miles* of highway in order to use a *quarter of a mile* of highway.

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[5] *Aero Mayflower Transit Co. v. Georgia Public Service Commission* (1935), 295 U.S. 285, 79 L.ed. 1439.

We do not here complain of the tax exemption of city operations. The discrimination to which we point is the discrimination between appellant and the statewide operators. The same act of carrying a passenger across a city boundary line, which is the occasion for imposition of the tax upon *all* operators, imposes a tax upon appellant at a *very high rate* and a tax upon the statewide operators at *a very much lower rate.*

VI. THERE IS NO CALIFORNIA DECISION WHICH UPHOLDS THE CONSTITUTIONALITY OF THE STATUTE AGAINST THE CHARGE OF DISCRIMINATION MADE BY APPELLANT IN THIS CASE.

A. General Summary of California Decisions Cited by Appellee.

Appellee cites several decisions of the Supreme Court of California as sustaining the constitutionality of the statute here challenged.[6] In *none* of those decisions was the particular predecessor statute challenged by any claim of discrimination similar to that here urged by appellant. All said decisions relate to tax years prior to the growth and development of urban mass passenger transportation by automobile bus, and prior to the time when it made any difference to anybody whether the tax base was prorated between incorporated and unincorporated territory or not.[7]

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[6] *In re Bush* (1936), 6 Cal.2d 43, 56 Pac.2d 511; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 Pac. 235; *In re Schmolke*, 199 Cal. 42, 248 Pac. 244; *Bekins Van Lines, Inc. v. Johnson* (1942), 21 Cal.2d 135, 130 Pac.2d 421.

[7] The *Bacon* and *Schmolke* cases related to the years 1924 and 1925; and the *Bush* and *Bekins* cases to the years 1935 and 1936. The trial court indicated judicial notice of the origin and growth of the business (Rep. Tr. 64-66) and this court will probably similarly judicially notice that urban mass passenger transportation by automobile bus is a very recent development.

B. The Bacon and Schmolke Cases.

Referring first to the two early decisions in the *Bacon* and *Schmolke* cases, in both of which this court dismissed writs of error, no constitutional question in any way resembling appellant's claim of discrimination was presented or considered. Those cases relate to the years 1924 and 1925 respectively, which years were long prior to any such thing as urban mass transportation by automobile bus. Neither of those cases goes as far as this court itself went in the *Continental Baking Co.*[8] case in upholding the exemption from such a tax of all operations inside incorporated cities.

C. In re Bush, 6 Cal.2d 43, 56 Pac.2d 511.

The leading California case on the constitutionality of this statute is the *Bush*[9] decision upon which the District Court of Appeal relied in affirming the judgment of the trial court and from which appellee quotes in its argument. In the *Bush* decision the Supreme Court of California went as far as this court itself went in the *Continental Baking Co.* case and no farther, i.e., it upheld the statute against the claim that it was discriminatory because it exempted motor vehicles operated exclusively within incorporated cities.

There was not involved in the *Bush* case the contention which appellant makes here, namely that if operations inside cities are tax exempt the tax base should then be prorated in the case of operations *partly inside* and *partly outside* cities.

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[8]*Continental Baking Co. v. Woodring*, 286 U.S. 352, 76 L.ed. 1155.

[9]*In re Bush* (1936), 6 Cal.2d 43, 56 Pac.2d 511.

There are two very good reasons why the discrimination of which appellant here complains was not passed upon or in any way involved in the *Bush* case. In the first place, the *Bush* case related to operations in the year 1935, which was prior to the time when it made any difference in money to anyone whether the tax base was prorated between incorporated and unincorporated territory or not. In the second place, the operator in the *Bush* case was in exactly the *opposite* situation to that of appellant, i.e., he operated almost exclusively in *un*incorporated territory and to only an insignificant extent in the little city of Taft.[10] Bush had not the slightest interest in the discrimination of which appellant here complains and never even suggested it in his lawsuit. If Bush had raised the same question which appellant here presents, and even if he had won his case, he would have paid almost exactly the same amount of taxes.

D. Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 130 Pac.2d 421.

The *Bekins*[11] decision adds nothing whatever to the *Bush* decision. As the Supreme Court said in the excerpt from its opinion quoted by appellee, no constitutional question was even raised in that case. The court's observation on the constitutionality of the statute was pure dictum based on the *Bush* case, without benefit of argument or occasion for reflection.

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[10]The record on file in the Supreme Court in the *Bush* case discloses that Bush operated a bulk oil delivery station in the little city of Taft, in connection with which he operated a delivery truck throughout surrounding unincorporated territory of approximately 1400 square miles in extent.

[11]*Bekins Van Lines, Inc. v. Johnson* (1942), 21 Cal.2d 135, 130 Pac.2d 421.

The discrimination of which appellant here complains has never been considered by any California court in any reported decision until the present case. None of the three California courts to which this case was presented wrote an opinion on the constitutional question. The District Court of Appeal said "it is not for this court to say" and the Supreme Court denied a hearing without any opinion at all.

VII. LIGGETT & COMPANY v. LEE, 288 U.S. 517, 77 L.ed. 929.

In our Jurisdictional Statement we cited this court's decision in *Liggett v. Lee* for the very broad general proposition that it is discriminatory and violative of the Fourteenth Amendment for a statute to step up the rate of a tax against a particular class of taxpayers because their operations happen to cross a boundary line between political subdivisions where such crossing affords no reasonable basis for the classification. It seems to us that there is a certain analogy between our case and *Liggett v. Lee* because in our case it is the circumstance of appellant's passenger crossing a city boundary line that subjects appellant to a higher rate of tax on the fare paid than statewide operators are subjected to for their use of the same highways.

Appellee says that *Liggett v. Lee* "possibly would be of some interest" if appellant were claiming discrimination in favor of city operators instead of state operators. It is true that the particular discrimination involved in *Liggett v. Lee* was between a store chain which crossed a county boundary line and one confined to a single county, but the broad principle for which we cited the decision is still applicable. It is true we are not here

claiming discrimination in favor of the city operators, but when appellant's passenger crosses the city boundary line it steps up the rate of appellant's tax on the fare over that of the statewide operators just as clearly as the rate of tax was stepped up in *Liggett v. Lee.*

Appellee further argues that the principle of *Liggett v. Lee* is of little value in view of such decisions as the *Aero Transit Co.*[12] decision. We have elsewhere pointed out that the *Aero Transit Co.* decision applies only to a tax in a definite fixed amount, to be paid by all alike, and has no application to a tax on gross receipts which subjects one class of operators to a much heavier burden than it subjects others.

VIII. CONTINENTAL BAKING CO. v. WOODRING, 286 U.S. 352, 76 L.ed. 1155.

Appellee does not in any way dispute the discussion of the *Continental Baking Co.* decision in our Jurisdictional Statement. We ourselves pointed out that the matter of the interpretation of the Kansas statute was raised by the plaintiffs "apart from their contentions of unconstitutional discrimination."[13]

The fact remains, however, that the Kansas statute which this court upheld was very carefully interpreted *not* to contain the very discrimination of which we complain in the California statute.

This court's decision in the *Continental Baking Co.* case upheld the exemption of operations inside cities, **but only** *in a statute which provided for prorating the tax in the case of operations partly inside and partly outside cities.*

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[12]*Aero Mayflower Transit Co. v. Georgia Public Service Commission* (1935), 295 U.S. 285, 79 L.ed. 1439.

[13]Jurisdictional Statement, page 25.

IX. THE VERY NATURE OF APPELLEE'S ARGUMENT ESTABLISHES THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL WHATEVER MAY BE THE ULTIMATE DECISION ON THE MERITS.

A very good reply to appellee's argument as a whole is the kind of discussion it necessarily leads to.

This brief is not a full presentation of the Federal questions on their merits, but is merely an argument in opposition to a motion to dismiss or affirm.

We understand that it is incumbent on us *now* to show *only* that the Federal questions raised are substantial. The kind of discussion that appellee's argument necessarily opens up is the best reply to a motion to dismiss or affirm.

X. PRAYER.

We feel we have shown that the Federal questions raised are substantial and of exceptional public interest and importance; and that this court has jurisdiction of this appeal under the provisions of Title 28, Section 1257, subdivision (2) of the United States Code; and that appellee's motion to dismiss or affirm should be denied; and that this court should note its jurisdiction herein and set the case for hearing.

Dated: San Francisco, California, May 16th, 1949.

Respectfully submitted,

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